



Consultation, IA &lt;consultation@bia.gov&gt;

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**Fwd: Response to 4-21-14 FedRegister Notice Re 25 CFR Part 83**

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**Appel, Elizabeth** <elizabeth.appel@bia.gov>

Mon, Jul 21, 2014 at 8:23 AM

To: IA Consultation &lt;consultation@bia.gov&gt;

----- Forwarded message -----

From: **Fleming, Lee** <lee.fleming@bia.gov>

Date: Mon, Jul 21, 2014 at 8:16 AM

Subject: Fwd: Response to 4-21-14 FedRegister Notice Re 25 CFR Part 83

To: Elizabeth Appel &lt;elizabeth.appel@bia.gov&gt;

Cc: [Toppin@aol.com](mailto:Toppin@aol.com)

----- Forwarded message -----

From: **Fleming, Lee** <lee.fleming@bia.gov>

Date: Mon, Jul 21, 2014 at 8:16 AM

Subject: Re: Response to 4-21-14 FedRegister Notice Re 25 CFR Part 83

To: [Toppin@aol.com](mailto:Toppin@aol.com)

Dear Ms. Willman,

With this e-mail response, I am forwarding your comments to Ms. Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action. As the *Federal Register* notice also states, "Comments on this rule must be receive by August 1, 2014."

R. Lee Fleming  
Director, Office of Federal Acknowledgment

On Sat, Jul 19, 2014 at 4:02 PM, <[Toppin@aol.com](mailto:Toppin@aol.com)> wrote:

July 18, 2014

R. Lee Fleming, Director,  
Office of Federal Acknowledgment  
Assistant Secretary, Indian Affairs  
1951 Constitution Avenue NW  
MS-34B SIB  
Washington DC, 20249

RE: Acknowledgement of Indian tribes  
Federal Register, June 25, 2014  
OMB Control No. 1076-0104

Dear Mr. Fleming,

This letter provides comments specific to the above-noted Federal Register Notice of June 25, 2014 as well as related questions regarding impacts of federal acknowledgement activities of the Bureau of Indian Affairs.

**BACKGROUND:** Historically the root origin of the Bureau of Indian Affairs was associated with the Department of War (now DOD), and later the Department of Interior. The initial formation and mission of this agency was once twofold: 1) to manage the activities, needs and issues of American Indians; and 2) to keep the settlers of this country safe. Hundreds of Treaties were enacted to serve this dual purpose.

Somewhere along the timeline, perhaps June of 1934, the Bureau of Indian Affairs ceased the mission of protecting "settlers," ancestors of today's non-tribal taxpayers, and focuses now entirely on the needs of Indian tribes.

With the exception of unorganized Alaska boroughs, all Indian reservations in the lower 48 states are co-located within counties, cities and towns of their host states. No reservation is an island unto itself, resulting in inherent jurisdictional conflict, service replications and redundancies, and competing economies – tax-exempt and taxable. We now have 566 federally recognized Indian tribes located in over 40 states. Including several hundred tribes in Alaska, some states have as high as 97 tribal governments (CA), or 32 (WA), or as few as three tribes (TX). The questions of the day are:

**1. Are 566 federally recognized tribes too few?**

**2. Is the economic carrying capacity of the United States or an individual State so strong as to endure in perpetuity annual federal subsidies by at least 29 federal agencies to 566 Indian tribes?**

Each State has a fixed boundary and land base unchanged since Statehood. Within States that host Indian tribes, the various private tribal government land bases are escalating with the resources of the federal government and lucrative gaming monopoly money; State land bases are eroding proportionally. Economies of communities, large and small, that host massive gaming institutions and tax-exempt tribal businesses are shrinking from the redirection of disposable income into tax-free slot machines, tax-exempt tribal businesses, and the indirect benefits associated with significant monetary contributions to both political parties, high-power lobbyists and legal counsels garnering more and more resources for the current 566 tribes.

**3. Is this growing private (blood-quantum-based) government system expanding across the country sustainable from a State's perspective, or even the national perspective?**

**4. How much longer will it be permitted that non-tribal taxpayers must forever fund as indentured servants, but may not participate in private governments co-located in**

their

communities and State?

## CONCERNS:

**1. FEDERAL AUDIT OF ALL ANNUAL INDIAN SUBSIDIES:** Not in recent memory, or perhaps ever, has Congress asked the General Accounting Office, or any other entity to actually quantify the annual federal dollars expended directly on behalf of federally recognized Indian tribes. Until such a report is provided, and a cost-benefit analysis accomplished, the current Federal Acknowledgement Policy (25 CFR Part 83) should remain unchanged. Taxpayers have a right to know what they have been required to fund, and how much additional funding for new tribal recognitions will impact that current enormous dollar.

**5. Are there any available annual funding reports specific to Indian tribes, produced and analyzed to determine the taxpayer burden of funding 566 Indian tribes?**

**6. Is the Agency willing to pursue and produce such a report before determining the need for additional Indian tribes?**

**2. BIA IMPLEMENTATION AND STAFFING OF A "RELAXED" 25 CFR PART 83:** Concurrent with a reduction in stringent criteria for federal recognition, additional BIA staff and resources will be required to accommodate the rush of applications and time-sensitive promises made.

**7. Will this additional fiscal expenses be estimated and announced in advance of final agency decision-making?**

**8. What is the ratio or relationship to the number of Indian tribes serviced by the BIA to the number of required BIA employees to perform such services? Please explain the correlation over the past ten years between number of tribes and the growth in the BIA overall workforce.**

**3. JUDICIAL TRENDS.** The U.S. Supreme Court, and federal Appellate Courts have, at least since 2005 with the *Sherrill* decision; 2009 with *Carcieri*, *Hawaii*, *Navajo* decisions; 2012 with *Patchak* decisions, 2013 with, *Baby Veronica* decision; and 2014 *Schuetz* decision, become keenly sensitive to the unconstitutional impacts of federal Indian policy overreaching. The High Court came within a whisper of overturning *Morton v. Mancari* (1975) which ruled blood-quantum Indian tribes to be "political" entities rather than "racial." More recently, the *Schuetz* ruling of 2014 makes clear that the Fourteenth Amendment protects individuals only and not groups. While tribal governments have been immune from Affirmative Action, the movement for equal protection under the law is not boding well for tribal governments.

In *Schuetz* is the following quote: **"More fundamentally, it misreads the Equal Protection Clause to protect "particular group[s]," a construction that we (Supreme Court) have tirelessly repudiated in a "long line of cases understanding equal protection as a personal**

**right.”** (Parenthesis added).The aggregate message coming from the High Court is strengthening the rights of states and individuals, and providing new legal tools to ensure balance when federal Indian policy and/or “Indian Country” is arbitrarily imposed on non-members. The overturning of *Morton v. Mancari* is within grasp, so now may not be the best time to be rolling out an unwarranted escalation of new tribal recognitions.

**9. Wouldn't it be more fiscally and politically prudent to at least temporarily calm the recognition activity of additional tribes until current and future cost is made known, and some improved balance is achieved that returns the BIA back to its original mission—that of protecting both American Indians, as well as protecting the non-tribal taxpayers (“settlers”) footing the bill?**

#### **4. SPECIFIC PROPOSED REVISION TO 25 CFR PART 83:**

**Purpose Clause.** In over two-hundred years of this Country's existence, time has long past for an aggregate group of Indians to suddenly realize that they are a tribe. Perhaps tribes in the current pipeline for recognition should be able to continue under existing criteria, but this entire “Revision” appears to be nothing more than a policy to increase and expand federal control of lands in States and to continue to bloat the staffing of the BIA bureaucracy.

**83.7 (a) Criterion A (1 through 6).** The deletion of this section relegates evidence of any past semblance as an Indian tribe to the “If we say so” category, with no additional corroboration from federal or state agencies, authentic historical documents...nothing.

**10. At Sec. 83.10, there is the following: “OFA may also initiate other research for any purpose relative to analyzing the documented petition and obtaining additional information about the petitioner's status.” Really? With all the deletions of criteria from existing policy, why would one bother?**

**83.7 (b):** How will the currently subjective term “*substantial*” be defined, as it appears in the Draft: “the petitioning group comprises a distinct community and has existed as a community from 1934 until the present without *substantial* interruption?” The current case-by-case use of “substantial interruption” is inconsistent with the deletion of any of the requirements removed from Section 83.7 (a).

**83.7 (c) (1) (i).** California “tribes” with as few or fewer than three members have been previously federally recognized.

**11. How will a revised draft of 25 CFR Part 83 assess an applicant's ability to “mobilize significant numbers of members and significant resources from its members?”**

**83.7 (c) (2):** The criteria for demonstrating political influence or authority, as expressed in (i) through (v) is no more stringent than the universal daily and lifetime behaviors of most families.

**83.10 (b)(1) – Technical Assistance:** The draft is actually asking the reader to believe the following circular statement: *“This technical assistance review does not constitute review to determine if the petitioner meets the criteria for acknowledgement as an Indian tribe. It is preliminary review for the purpose of providing the petitioner an opportunity to supplement or revise the documented petition prior to active consideration.* One might imagine that the purpose of technical assistance for “revising” and “supplementing” would necessarily include “the meeting of criteria.” So applicants merely need to submit their best efforts, then BIA technical assistance team will polish it up for them “before consideration.”

**83.12 Final Determination:** This section explains what happens next, but does not define exactly what constitutes a “final determination.”

**12. Is the “final determination” a mere signature of the Assistant Secretary, or a federal charter, and/or some appropriate concurrence by Congress? Please explain.**

**CONCLUSION:** Until a full fiscal accounting to Congress and the general public is accomplished to provide a record of all annual federal dollars expended for all currently recognized federal Indian tribes, from each/all federal agencies subject to Executive Order 13175 (Nov. 6, 2000) and its progeny, this Draft Revision of 25 CFR Part 83 must be suspended.

The current proposed revision of 25 CFR Part 83 guarantees escalation of an unknown number of new tribal governments beyond the existing 566 while no one yet knows the annual cost across the board of all federal agencies to fund existing tribes, nor can the cost of future tribal recognitions be even estimated in a cursory manner. This revision must not go forward until sunshine is placed on the cost to the taxpayers.

The aggregate cost associated with current federal Indian policy remains a complete mystery even to the Department of Interior, Congress and certainly to public. Until the current cost for federally subsidizing 566 Indian tribes is identified and fully disclosed to the general public, neither Congress nor the BIA decision-makers can possibly assess the future economic impact that the Draft Revision to 25 CFR Part 83 forebodes.

Lastly, I request to be permanently identified as an “Interested Party” for all actions directly associated with policy changes or revisions to 25 CFR Part 83.

Sincerely,

Elaine Willman  
2990 South Pine Tree Road  
Hobart, WI 54155

Email: [toppin@aol.com](mailto:toppin@aol.com)

Phone: 509-949-8055

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